Supreme Court, U.S.
F I L E D
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No. 01-1363

In The

Supreme Court of the United States

PETER TERRITO AND STEVEN KENNEDY, *et al.*,

Petitioners,

v.

ALFRED ADAMS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Fifth Circuit Court Of Appeal

OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

Table of Authorities ii

Reasons Why Certiorari Should Be Denied..... 1

TABLE OF AUTHORITIES

Page

CASES

Abadie v. Metropolitan Ins. Co., et al., 784 So.2d 46 (La. App. 5th Cir.), *writ denied*, 804 So.2d 642 (La. 2001) 3, 4

Fillinger v. Foster, 448 So.2d 321 (Ala.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 223 (1984) 1, 2, 3, 5, 7

Gavin v. Alumax of South Carolina, Inc., 787 F.2d 910 (4th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 314 (1986) 5

Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272, 79 S.Ct. 266 (1959) 3

Lenane v. Continental Maritime of San Diego, Inc., 72 Cal. Rptr. 2d 121, 1998 AMC 1130 (Cal. Ct. App.), *review denied*, 05-20-1998 (Cal.), *cert. denied*, 525 U.S. 1002, 119 S.Ct. 513 (1998) 3

Logan v. Louisiana Dry Dock, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939, 110 S.Ct. 30 (1989) 1, 2, 3, 5, 7

Perron v. Bell Maintenance and Fabricators, Inc., 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913, 110 S.Ct. 3273 (1993) 2, 3

Peter v. Hess Oil, 903 F.2d 935 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 112 L. Ed. 2d 846 (1991) 2

Poche v. Avondale Shipyards, 339 So.2d 1212 (La. 1976), *appeal dismissed sub nom Territo v. Poche*, 434 U.S. 803, 98 S.Ct. 31 (1977) 1, 2, 3, 6

Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432 (1980) 1

Victory Carriers, Inc. v. Law, 404 U.S. 202, 30 L. Ed. 2d 383, 92 S.Ct. 418 (1971) 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES

33 U.S.C. § 902(4) 4

33 U.S.C. § 905 4

33 U.S.C. § 933(i) 5

43 U.S.C. § 1333(a)(2)(A) 2

LSA-R.S. 23:1032 4

LSA-R.S. 23:1035.2 4

OTHER

T. Thorne, *The Impact of the Longshore and Harbor Workers' Compensation Act on Third Party Litigation*, 68 Tul. L. Rev. 557, 570-571 (1994) 1

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (1994) 2

REASONS WHY CERTIORARI SHOULD BE DENIED

The decision below does not create a conflict in the jurisprudence. Assuming a conflict exists, that "conflict" can only be attributed to the Alabama Supreme Court's decision in *Fillinger v. Foster*, 448 So.2d 321 (Ala.), *cert. denied*, 469 U.S. 872, 105 S.Ct. 223 (1984), which chose not to follow *Poche v. Avondale Shipyards*, 339 So.2d 1212 (La. 1976), *appeal dismissed sub nom Territo v. Poche*, 434 U.S. 803, 98 S.Ct. 31 (1977). *Poche* had accurately predicted this Court's ruling in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1980), that the only preemptive effect of the Longshore Harbor Workers' Compensation Act ("LHWCA") is to guarantee a minimum level of recovery to covered employees, a floor which states were free to supplement under their own laws. *See* 447 U.S. at 723-24; 100 S.Ct. at 2438.[1] This Court denied writs in *Fillinger*, as it did in *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La.), *cert. dismissed*, 492 U.S. 939, 110 S.Ct. 30 (1989), which was Louisiana's post-*Sun Ship* and post-*Fillinger* reaffirmation of *Poche*.[2]

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[1] "In *Poche v. Avondale Shipyards*, the Solicitor of Labor, at the request of the U.S. Supreme Court, filed an *amicus* brief, arguing that the LHWCA was not a bar." T. Thorne, *The Impact of the Longshore and Harbor Workers' Compensation Act on Third Party Litigation*, 68 Tul. L. Rev. 557, 570-571 (1994).

[2] Opponents do not concede that there is a conflict in the jurisprudence. *Sun Ship*'s holding that states are free to supplement LHWCA recovery provides but one method of harmonizing the cases.

> The *Sun Ship* Court upheld the right of states to exercise concurrent jurisdiction over maritime-related injuries covered by the Longshore Act, but it

Neither the petition nor the *amicus* brief provide any convincing impetus for this Court to change course, and review *Poche/Logan*, and *Fillinger* now, by considering the decision of an intermediate Louisiana appellate court following well-established precedent in accord with the view of the majority of commentators, who have concluded that LHWCA does not preempt supplementary state remedies, including exemptions from workers' compensation laws that allow tort recovery in certain circumstances. *See Logan, supra,* 541 So.2d at 185 ("A clear majority of the commentators, however, find concurrent jurisdiction is the better rule for a variety of legal and policy reasons. We agree."). Eighteen years have passed since the alleged conflict arose. In those years, the issue raised in these cases has rarely arisen again,[3] and insurance premiums have been adjusted and paid based

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is up to the individual states whether that right is exercised.

Thomas J. Schoenbaum, *Admiralty and Maritime Law* (1994), Sec. 5-4, at 332 n. 11, citing *Logan v. Louisiana Dry Dock*, 541 So.2d 182 (La. 1989). *Fillinger* and *Poche* simply represent two different states' determinations of whether they have chosen to exercise concurrent jurisdiction and supplement LHWCA recovery.

[3] The petition points to only two other cases which allegedly discuss the issue. *See Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 507 U.S. 913, 110 S.Ct. 3273 (1993), and *Peter v. Hess Oil*, 903 F.2d 935, 952 n. 17 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1067, 112 L. Ed. 2d 846 (1991). In *Peter*, the purported "conflict" between *Fillinger* and *Poche/Logan*, although openly discussed, *see* 903 F.2d at 952 n. 17, was not deemed worthy of *certiorari*. In *Perron*, the court held that Louisiana law did not apply under the terms of the Outer Continental Lands Shelf Act, 43 U.S.C. § 1333(a)(2)(A), because the state and federal rules were

upon the results of both *Poche/Logan* and *Fillinger*. A routine application of the *Poche/Logan* line to Louisiana defendants, who are covered by insurance bought and paid for based upon the possibility of tort liability, is hardly an event that justifies this Court entering the discussion to upset what has now become well-settled rules.[4]

Nor is this Court's intervention necessary to prevent some potential future disruptive development. Ignored by the petition and the *amicus* brief is the fact that the cause of action at issue in these cases – "executive officer" tort liability for supervisory co-employees – is no longer

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different. 970 F.2d at 1413-14. Preemption under LHWCA was not at issue.

[4] *Amicus* disputes that the court below applied a well-established rule, and divines a "novel" feature of its decision in the observation that the concurrent jurisdiction approved in *Sun Ship* allows a state to impose tort liability as a feature of supplemental recovery allowed by its compensation laws, because the plaintiff who foregoes LHWCA recovery in favor of a state plan, may take advantage of the "entirety of that scheme," including its exemptions and immunity rules. *See Abadie v. Metropolitan Ins. Co., et al.*, 784 So.2d 46 (La. App. 5th Cir.) (App. 26). This observation is not novel, and is in fact the precise holding of this Court in *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266 (1959) (*per curium*) (worker who elected to proceed under state worker's compensation system can sue for negligence where employer refuses to pay compensation and state act allows such a suit). *See, e.g., Lenane v. Continental Maritime of San Diego, Inc.*, 72 Cal. Rptr. 2d 121, 124, 1998 AMC 1130, 1133 (Cal. Ct. App.), *review denied*, 05-20-1998 (Cal.), *cert. denied*, 525 U.S. 1002, 119 S.Ct. 513 (1998) (holding that the exclusive remedy provision of LHWCA does not prohibit a ship repairer who was injured ashore from bringing a tort claim against his employer within the exception to the exclusive liability provision of the California workers' compensation statute).

an exception to Louisiana workers' compensation scheme, and has not been since 1976 when executive officers were granted tort immunity. *See Abadie v. Metropolitan Ins. Co., et al.*, 784 So.2d 46 (La. App. 5th Cir.), *writ denied*, 804 So.2d 642 (La. 2001), discussing LSA-R.S. 23:1032 (eff. Oct. 1, 1976) (App. 16). The only reason for executive officer liability in the cases that are the subject of the petition for *certiorari* is that the claims arose prior to 1976, and were therefore protected by the vested rights doctrine. *See id.* (App. 21-22).[5] Accordingly, in Louisiana at least, prospective "executive officer" suits will not arise to purportedly conflict with the LHWCA. As to other jurisdictions, the petition fails to enumerate the few, if any, states whose laws might "conflict" with the LHWCA by allowing executive officers to be sued in tort.[6]

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[5] Moreover, in 1990, Louisiana adopted a provision that precludes recovery under its compensation laws for any injury covered by the LHWCA. *See* LSA-R.S. 23:1035.2. As the court below observed, "LSA-R.S. 23:1035.2 now divests plaintiffs of the concurrent state and federal remedies" that existed between 1972, when federal relief became available to maritime employees working on land, and 1990, when federal relief became exclusive by operation of Louisiana law. *See Abadie, supra* (App. 25-26).

[6] Opponents do not concede that executive officer liability conflicts with the LHWCA. 33 U.S.C. § 905, which is the "exclusive liability" section of the Act, grants immunity to "employers," a term defined in Section 902(4) as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Co-employee liability is only

The cases below are even less worthy of *certiorari* than *Logan* or *Fillinger*, not only because they represent the tail-end of a now mooted "conflict", but also because the issue allegedly raised by them as identified in the "questions presented" to this Court are not ripe. The petition assumes that the plaintiffs are covered by the LHWCA, but this has never been resolved by any of the lower courts. The plaintiffs argued at every level that there was no proof in the record of this case that they

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mentioned in Section 933(i), which provides that "[t]he right to compensation or benefits *under this Act* shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer.") (emphasis added). On its face, that section has no operation in cases which do not arise "under the Act." There is nothing in the LHWCA that purports, either expressly or by implication, to preempt a state law that might allow recovery against co-employees, who do not participate in the quid-pro-quo that allegedly forms the basis of tort immunity. As the Fourth Circuit observed, relying on this Court's decision in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 30 L. Ed. 2d 383, 92 S.Ct. 418 (1971), as one which "left no doubt about the matter," "[t]he third party action, when founded on state law, is a creature of state law and is to be governed entirely by it.*** [In the LHWCA,] Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law claims. The federal immunity rule is to be applied when the third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied. The federal and state statutes are readily harmonized, and each may function in its own sphere without interference with the other." *Gavin v. Alumax of South Carolina, Inc.*, 787 F.2d 910, 917-18 (4th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 314 (1986).

were LHWCA-covered employees, a burden which they contended rested upon the defendants. As was stated in the brief filed in the Louisiana appellate court:

> The Avondale Defendants' preemption argument is based upon the assumption that each of the plaintiffs could have received compensation under the LHWCA, and thus could not maintain state law claims. Instead of offering proof of that fact, the Avondale Defendants ask this Court to accept it as true because "each plaintiff failed" to prove to the contrary. *See* Avondale Defendants' Brief, at 14.
>
> But, the Avondale Defendants have misallocated the burden of proof. Preemption is an affirmative defense, and the burden of proof with regard to it belonged to Avondale. *See Walls v. American Optical Corp., supra,* 740 So.2d at 1267-1268 (burden of proof regarding affirmative defense rests upon defendant); *Cooper v. Borden, Inc.,* No. 30,292 (La.App. 2nd Cir. 2/25/98), 709 So.2d 878, 881 (preemption is an affirmative defense).
>
> Since the Avondale Defendants failed to establish each plaintiff's entitlement to LHWCA payments through facts documenting that each plaintiff was covered by that Act, their preemption argument fails on the facts, even if they are correct in their contention about the lack of concurrent remedies under LHWCA and state law.

This issue was pretermitted by the appellate court, which found that "the fact that plaintiffs *may* be classified as longshoremen does not preclude them from bringing a claim in tort under *Poche*." (App. 25) (emphasis added).

The issue raised in the instant application is the same one that was not worthy of review more than twenty years ago, when first raised to this Court. No crisis has emerged as a result of this Court's denial of *certiorari* in *Fillinger* and *Logan*. Instead, these decisions have simply been incorporated into risk management decisions. No future circumstance will require a reopening of the issue, since legislation and jurisprudential developments have effectively mooted the question entirely. The only thing at issue in the petition and the *amicus* brief is whether certain Louisiana executive officers are retroactively provided an absolute defense to a discreet class of cases arising under pre-1976 Louisiana state law. *Certiorari* is not appropriate.

Respectfully submitted,

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